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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 787

CITY OF EAST DETROIT, a Municipal Corporation, Aloysius L. Kapelczak, James E. Anderson, George S. Stone, Sr., Edward J. Bonior and Donald G. Tarnowski, as the Mayor and Common Council of said City and the Board of Appeals on Zoning of said City, and Charles H. Beaubien, as City Clerk and City Manager,
Petitioners and Defendants,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,
Respondent and Plaintiff

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT and APPENDIX

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Petitioners and Defendants,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,
Respondent and Plaintiff

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Sixth Circuit, entered in the above entitled cause on December 14, 1959.

(A) OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, appears in 272 F. 2nd 410. A copy of the judgment and opinion of the Court are attached hereto as appendix.

The Findings of Fact and Conclusions of Law and the opinion of the Honorable Arthur F. Lederle, District Judge for the Eastern District of Michigan, Southern Division are not attached being contained in copies of the Joint Appendix printed for the United States Court of Appeals, Sixth Circuit, nine copies of which have been filed with this Court. Rule 21 (4).

(B) JURISDICTION

(i) This suit was brought by plaintiff, The Detroit Edison Company, a New York Corporation, against petitioners, a Michigan Municipal Corporation and its officers, solely on the basis of diversity of citizenship under 28 United States Code, Section 1332.

(ii) Jurisdiction of this Court to issue a writ of certiorari is conferred by 28 United States Code 2101 (c).

The Court of Appeals for the Sixth Circuit affirmed on December 14, 1959, the judgment of the United States District Court, Eastern District of Michigan, Southern Division.

(C) QUESTIONS PRESENTED FOR REVIEW

I.

WITHOUT A DECISION OF A STATE COURT SHOULD AND DID A FEDERAL COURT INTERPRET CORRECTLY "TRANSMISSION SYSTEMS" TO INCLUDE A 300' x 600' TRANSFORMER STATION WITH 30 FOOT HIGH TOWERS WITHIN THE "ESSENTIAL SERVICES" SECTION OF A LOCAL ZONING ORDINANCE SO AS TO PERMIT SAID TRANSFORMER STATION TO BE BUILT IN AN AREA ZONED AND LIMITED TO SINGLE FAMI RESIDENCE?

II.

ASSUMING THAT A TRANSFORMER STATION IS WITHIN THE TRANSMISSION SYSTEMS OF "ESSENTIAL SERVICES" SHOULD A FEDERAL COURT ENFORCE THAT PROVISION OF A LOCAL ZONING ORDINANCE WHICH EXCEPTS "ESSENTIAL SERVICES" ENTIRELY FROM ZONING SO THAT IT MAY BE PLACED IN ANY AREA OF A CITY EVEN WHEN IT HAS BEEN ZONED SINGLE FAMILY RESIDENTIAL WITHOUT A DECISION OF A STATE COURT APPROVING BLANKET ZONING EXEMPTIONS FOR UTILITIES, PARTICULARLY WHEN THE U. S. COURT OF APPEALS HAS AFFIRMED A DECISION WHICH DECIDED AN IMPORTANT STATEWIDE QUESTION IN A WAY WHICH PROBABLY WOULD BE IN CONFLICT WITH THE STATE LAW IF THE STATE COURTS HAD BEEN INVOKED TO ADJUDICATE THIS PARTICULAR ISSUE?

(D) STATUTES AND ORDINANCES

Statutory and ordinance provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in appendix, page 13 attached hereto.

Public Acts of Michigan for 1921, No. 207, Page 402, and following, as amended, being M. S. A. 5.2931-5.2940.

AN ACT to provide for the establishment in cities and villages of districts or zones within which the use of land and structures, the height, the area, the size and location of buildings may be regulated by ordinance, and within which districts regulations shall be established for the light and ventilation of such buildings, and within which districts or zones the density of population may be regulated by ordinance; to provide by ordinance for the acquisition by purchase, condemnation or otherwise of private property which does not conform to the regulations and restrictions of the various zones or districts so provided; to provide for the administering of this act; to provide for amendments, supplements or changes hereto; to provide for conflict with the state housing code or other acts, ordinances or regulations; to provide penalties for the violation of the terms hereof and to give immediate effect thereto.

Ordinance No. 260, being the official Zoning Ordinance of the City of East Detroit.

(E) STATEMENT OF THE CASE

June 24, 1957, the City of East Detroit, Macomb County, Michigan, adopted a Zoning Ordinance, known as "Ordinance No. 260."

Plaintiff secured options and exercised its right to acquire in fee simple title to the following described real estate:

> "Lots 51 through 58, both inclusive, Assessor's Plat of Stricker's Small Farm Subdivision, East Detroit, Macomb County, Michigan."

Pursuant to the zoning ordinance, this real estate was zoned "R-1 ONE FAMILY RESIDENTIAL DISTRICTS", permitting one family dwellings.

No covenants or restrictions running with the land have been recorded.

The Assessor's Plat of Stricker's Small Farm Subdivision consists of 58 platted plots. Forty-two (42) residential houses occupy forty-four (44) of the 58 platted lots; there are 13 vacant lots, and one lot has constructed thereon a one-story building containing 6 utility apartments.

Plaintiff desires to utilize the Lots 51 through 58 of said residential subdivision for a central transformer station into which will be sent high voltage electric current of approximately 120,000 volts, which, in turn, will be reduced to approximately 24,000 volts and transmitted to various sub-stations, which, in turn, will reduce the voltage to 4800 volts and in turn transmit the current to individual transformer devices customarily suspended on poles in the area to be served thereby and commonly known as "distribution transformers", which distribution transformers then transmit the electricity to the ultimate users at approximately 120/240 volts. The proposed transformer station shall encompass an area approximately 600 feet long by 300 feet wide and be surrounded in part by a wall 12 feet high facing on a residential street and 16 feet high on a through street. The supporting towers will be approximately 30 feet above ground level. Plaintiff will have approximately $3,500,000 invested in this transformer station.

Plaintiff did not apply for an amendment to the R-1 Zoning because it contended that said ordinance in Art. IV "General Provisions", sec. 4.14 "Essential Services" reads:

> "• • • it being the intention hereof to except such essential services from the application of this Ordinance."

Plaintiff interpreted the words "Essential Services" by application of Art. II "Definitions", sec. 2.20 "Essential Services" to include its transformer plant to be permissible in this R-1 one-family residential district because the zoning ordinance reads:

> "The phrase 'essential' services means the erection, construction, alteration or maintenance by public utilities or municipal department or commission of underground or surface or overhead gas, electrical, communication, steam or water transmission or distribution systems, including poles, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, towers, and other similar equipment and accessories in connection therewith (but not including buildings) reasonably necessary for the furnishings of adequate service by such public utilities or municipal departments or commissions for the public health, safety or general welfare."

Believing that a transformer station is within the "transmission or distribution system" phrase of the definition of "essential services", and not within the purvey of the zoning ordinance, no application for a zoning permit to comply with zoning was made. However, since the instruments controlling the transformer station should be housed in a "building" and the definition of "essential services" expressly excluded "buildings", on December 17, 1956, plaintiff filed a request with the Planning Commission for a permit to erect what it described as "a control shelter or container on such site as a part of said transformer station", in accordance with the Zoning Ordinance, Art. XIII "City Planning Commission Approval" Sec. 13.04 (c) which reads:

> "PUBLIC UTILITY BUILDING ERECTION OR ENLARGEMENT. Permit the erection and

use of a building, or an addition to an existing building of a public service corporation to be used for public utility purposes, in any permitted district to a greater height or of a larger area that the district requirements herein established, and permit the location in any use district of a public utility building structure, or use, providing the Planning Commission shall find such use, height, area, building or structure reasonably necessary for the public convenience and service, and provided, further, that such building structure, or use is designed, erected and landscaped to conform harmoniously with the general architecture and plan of such district."

February 6, 1958, the Planning Commission did not reach a decision because of a tie vote and referred the plaintiff's request to the Zoning Board of Appeals.

March 3, 1958, the Zoning Board of Appeals approved the request of the plaintiff.

May 12, 1958, the Board of Appeals on Zoning held a rehearing and denied the permit heretofore granted plaintiff on March 3, 1958.

June 11, 1958, the Detroit Edison Company, a New York Corporation, filed its action against defendants of Michigan citizenship in the United States District Court.

November 10, 1958, the Honorable Arthur F. Lederle, signed a decree for plaintiff, stating in effect that the Board of Appeals on Zoning had no jurisdiction to grant a rehearing (with which these petitioners fully agree as an accurate statement of the Michigan law) but also held that the word "transformer" was included in "essential services" of sec. 2.20 of the Zoning Ordinance and, therefore, was exempt entirely from any zoning whatsoever.

December 14, 1959, the United States Court of Appeals affirmed the United States District Court.

REASONS FOR GRANTING THE WRIT

I. Supreme Court Rule 19:

> "Considerations governing review of certiorari indicates that one of the reasons which will be considered for the purpose of granting certiorari is where a Court of Appeals has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

Petitioners believe that the United States Court of Appeals has affirmed a decision which decided an important state question thereby promulgating a rule which would be in conflict with the state law if the state law had heretofore decided this particular issue or, if a state court had been invoked to adjudicate this question.

The issue in this case is much more serious than the interpretation of one isolated section of a local zoning ordinance by a federal court.

The question of interpretation is whether or not a 300 x 600 foot transformer station may be built within a one-family residential district because a "transformer station" is included in the definition of "Essential Services" of sec. 2.20, Art. II, City of East Detroit's Zoning Ordinance, No. 260.

Much more serious is the *result* of the interpretation by the lower courts that a "transformer station" is included within the "essential services" phrase of the zoning ordinance: is it possible to *exempt* a transformer station completely from zoning so that a privately-owned utility may purchase land in any area within a municipality despite the fact that the land had been heretofore zoned residential and that said public utility without permission

of the City or anyone else erect a 300 x 600 foot transformer with 30 foot high towers despite said residential zoning?

Actually this is "spot zoning" by a federal court decision much more aggravated than the illegal "spot zoning" of city councils declared illegal by state courts.

2. While not heretofore raised in either the U. S. District Court or in the U. S. Court of Appeals, petitioners contend that a crucial issue of Michigan law is presented; hence should not this action be stayed until a declaratory judgment action in the Michigan State Courts defines the statutes and ordinances of the State and Cities of Michigan pertaining to this point involving zoning? This federal litigation is based solely on diversity and has resulted in a rule of local law probably in defiance of future local law. Zoning is peculiarly local. While not within the generalization of an "estate in land" zoning is related to land use and land values. The rule of *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940) should be extended to cover the instant litigation, particularly when a state court action was pending but became "moot" upon the revocation of the permit by the Zoning Board of Appeals, one reason therefore being that the Detroit Edison Company had purchased the real estate owned by two of the three plaintiffs in the state court action.

While the federal courts had jurisdiction in the *strict* sense, should not this action be deferred until the interpretation of a city's zoning ordinance be made by the Michigan State Courts?

Other local matters of law *not decided* by a state court are also involved herein:

A. Permitting "essential services" of this type is contra to P. A. 1921, No. 207, The City Zoning Act, which by state legislative fiat enables a city to divide its territory into zoning districts, sec. 3 thereof (M. S. A. 5.2933) reading:

> "Such regulations shall be uniform throughout any specified district but may differ from the regulations adopted for other districts."

To permit a "transformer station" to be placed in a residential zone at the whim of a privately-owned public utility violates the uniformity requirement.

B. Unprecedented local administrative procedure was employed and approved by the federal courts.

February 6, 1958, the Planning Commission could not agree (because of tie votes) and referred the matter to the City Council.

March 3, 1958, the City Council sitting as a "Board of Appeals on Zoning" approved the construction of the control house for the transformer station.

It is impossible for a Board of Appeals on Zoning to act as an appellate body from the Planning Commission. Its duties are specified in the City Zoning Act, (P. A. 1921, No. 207, Sec. 5, being M. S. A. 5.2935).

Moreover, the Plan Commission did not grant a permit for the "control" building. Assuming the City's Zoning Ordinance, sec. 13.04 (c) required a permit from the Plan Commission, obviously it was *not* the Plan Commission but the "Board of Appeals on Zoning" which granted the permit on March 3, 1958. The Board of Appeals therefore exercised a power reserved to the Plan Commission. Whether or not it granted a rehearing and thereby revoked the permit hence becomes immaterial. It could not revoke

an act which it had no jurisdiction or power to do in the first instance.

C. A change in use of land results in constructing a transformer station in an "R-1" zoned district. A change in use of this nature requires an amendment to the zoning ordinance by the City Council. Mere approval of an administrative group such as a planning commission is an illegal delegation of legislative power. Moreover, this is not within the jurisdiction of a planning commission, the source of its powers being found solely and exclusively in the City Zoning Act, (P. A. 1921, No. 207, Sec. 4, being M. S. A. 5.2934) which confers upon a city plan commission the right to recommend and report as a condition precedent to the city council *amending* the zoning ordinance. The Plan Commission of a city has no power to amend a zoning ordinance. Only the city council can amend zoning legislation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CITY OF EAST DETROIT, a Michigan municipal corporaion, Aloysius L. Kapelczak, James E. Anderson, George S. Stone, Sr., Edward J. Bonior and Donald G. Tarnowski, as the Mayor and Common Council of said City and the Board of Appeals on Zoning of said City, and Charles H. Beaubien, as City Clerk and City Manager,

Petitioners,

By: ROBERT E. CHILDS,
Its Special Counsel.

March 9, 1960.

APPENDIX A

STATUTES AND ORDINANCES

Public Acts of Michigan for 1921, No. 207, Page 402, and following, as amended, being M. S. A. 5.2931-5.2940.

AN ACT to provide for the establishment in cities and villages of districts or zones within which the use of land and structures, the height, the area, the size and location of buildings may be regulated by ordinance, and within which districts regulations shall be established for the light and ventilation of such buildings, and within which districts or zones the density of the population may be regulated by ordinance; to provide by ordinance for the acquisition by purchase, condemnation or otherwise of private property which does not conform to the regulations and restrictions of the various zones or districts so provided; to provide for the administering of this act; to provide for amendments, supplements or changes hereto; to provide for conflict with the state housing code or other acts, ordinances or regulations; to provide penalties for the violation of the terms hereof and to give immediate effect thereto.

Sec. 3, being M. S. A. 5.2933:

[5.2933] Regulation of congested areas. Sec. 3. The legislative body of cities and villages may limit and restrict the maximum number of families which may be housed in dwellings hereafter erected or altered, and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Such regulations must be uniform throughout any specified districts, but may differ from the regulations adopted for other districts. Such regula-

tions shall be designed to limit the overcrowding of land, to avoid undue congestion of population, to facilitate adequate provisions for a system of transportation, sewage disposal, water, education, recreation and other public requirements, and to promote public health, safety and general welfare. (C. L. '48, §125.583; C. L. '29, §2635.)

Sec. 4, being M. S. A. 5.2934:

§5.2934] Ordinances, enactment; hearing, notice; commission, appointment, proceedings, report; protest, effect. Sec. 4. The legislative body of any city or village may provide by ordinance for the manner in which such regulations and boundaries of districts or zones shall be determined and enforced, or from time to time amended, supplemented or changed: Provided, however, That a public hearing shall be held before any such regulations shall become effective: And provided further, That not less than 15 days' notice of the time and place of such public hearing shall first be published in an official paper or a paper of general circulation in such city or village, [and that not less than 15 days' notice of the time and place of such public hearing shall first be given by registered United States mail to each public utility company and to each railroad company owning or operating any public utility or railroad within the districts or zones affected,] and a hearing be granted any person interested at the time and place specified. In cities having a population of 25,000 or more according to the last federal or state census, the legislative body may appoint a commission to recommend in the first [1st] instance the boundaries of districts and appropriate regulations to be enforced therein. Such commission shall thereupon make a tentative report and hold public hearings thereon at such times and places as the legislative body shall require before submitting its final report. In cities having a population of 25,000 or more according to the last federal or state census,

said legislative body shall not in the first [1st] instance determine the boundaries of districts nor impose regulations until after the final report of a commission so appointed. In cities having a population of 25,000 or more according to the last federal or state census, the hearing as above provided before the legislative body shall not take place until such final report of such commission has been received, nor shall the ordinance or maps be amended after they are adopted in the first [1st] instance until the proposed amendment has been submitted to such commission and it has made report thereon. In either case the legislative body may adopt such ordinance and maps with or without amendments, or refer same again to the commission for a further report. Where a city has a city plan commission or corresponding commission the legislative body may appoint such commission to perform the duties above specified. After the ordinance and maps have in the first [1st] instance been approved by the legislative body of a city or village, amendments or supplements thereto may be made from time to time as above provided, but in case a protest against a proposed amendment, supplement or change be presented, duly signed by the owners of 20 per centum or more of the frontage proposed to be altered, or by the owners of 20 per centum or more of the frontage immediately in the rear thereof, or by the owners of 20 per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the three-fourths [¾] vote of such legislative body. (C. L. '48, §125.584; C. L. '29, §2636.)

Sec. 5, being M. S. A. 5.2935:

§5.2935 Objections and appeals.] Sec. 5. Board of appeals.] (a) The legislative body of any city or village may act as a board of appeals upon all questions arising under a zoning ordinance, and in such event the said legislative body may fix rules and regulations to govern its procedure sitting as such a board of ap-

peals. In the event that the legislative body of any city or village so desires, it may appoint a board of appeals consisting of not less than 5 members, each to be appointed for a term of 3 years: Provided, That appointments for the first year shall be for a period of 1, 2 and 3 years, respectively, so as nearly as may be to provide for the appointment of an equal number each year, depending on the number of members, thereafter each member to hold office for the full 3 year term. Such board of appeals shall hear and decide appeals from and review any order, requirement[s], decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the provisions of this act. They shall also hear and decide all matters referred to them or upon which they are required to pass under any ordinance of the legislative body adopted pursuant to this act. The concurring vote of 2/3 of the members of the board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which they are required to pass under any such ordinance or to effect any variation in such ordinance. Such appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the city or village. Wherever any city or village has created or may create a board of rules or board of building appeals, such board may be enlarged to consist of not less than 5 members, and these may be appointed as the board of appeals as herein provided.

Appeals, how taken.] (b) Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule, by the filing with the officer from whom the appeal is taken and with the board of appeals of a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board, all the papers constituting the record upon which the action appealed from was taken.

Stay.] (c) An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

Hearing and decision upon appeal.] (d) The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to [all persons to whom any real] property within 300 feet of the premises in question [shall be assessed], such notice to be delivered personally or by mail addressed to the respective owners at the address given in the last assessment roll, and shall decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or [may] modify the order, requirement, decision or determination appealed from and s'all make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have power in passing upon appeals to vary or modify any of its rules, regulations or provisions relating to the construction, structural changes in equipment, or alteration of buildings or structures, or the use of land, buildings or structures, so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done. The decision of such board shall not become final until the expiration of 5 days from the date of entry of such

order unless the board shall find the immediate effect of such order necessary for the preservation of property or personal rights and shall so certify on the record. The legislative body of any city or village may authorize the payment of not to exceed $5 per member[s] for attendance at regular meetings of such boards: Provided, That the foregoing limitation on payments to members shall not apply in any city now or hereafter having a population of [90,000] or more as determined by the last federal decennial census or by any federal decennial census hereafter taken.

(C. L. '48, §125.585; C. L. '29, §2637.)

Ordinance No. 260, being the official Zoning Ordinance of the City of East Detroit:

ORDINANCE No. 260

OFFICIAL ZONING ORDINANCE OF THE CITY OF EAST DETROIT

Article II

DEFINITIONS

Section 2.08 *Building.* Any structure either temporary or permanent, having a roof and used or built for shelter or enclosure of persons, animals, chattels, or property of any kind. This shall include tents, awnings or vehicles situated on private property and used for purposes of a building.

Section 2.20 *Essential Services.* The phrase "essential" services means the erection, construction, alteration or maintenance by public utilities or municipal department or commission of underground or surface or overhead gas, electrical, communication, steam or water transmission or distribution systems, including poles, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, towers, and other similar equipment and accessories in connection therewith (but not including buildings) reasonably necessary for the furnishings of adequate service by such public utilities or

municipal departments or commissions for the public health, safety or general welfare.

Section 2.56 *Use.* The purpose for which land or buildings thereon are designed, arranged, or intended to be occupied or used, or for which they are occupied or maintained.

Article IV

GENERAL PROVISIONS

Section 4.01 *Application of This Article.* Except as hereinafter provided no building or land, or part thereof, located in any district as herein established shall be used, altered, constructed or reconstructed, except in conformity with the provisions of this ordinance which apply to the district in which it is located.

Section 4.14 *Essential Services.* Essential services shall be permitted as authorized and regulated by law and other ordinances, it being the intention hereof to except such essential services from the application of *this Ordinance.*

Article V

R-1 ONE FAMILY RESIDENTIAL DISTRICTS

Section 5.01 *Uses Permitted.* In all R-1 Districts no building or land, except as otherwise provided in this Ordinance, shall be erected or used except for one or more of the following specified uses:

(a) one family dwellings

. . . . . .

Article VI

R-1-P ONE FAMILY RESIDENTIAL PARKING DISTRICTS

Section 6.01 *Uses Permitted.* In all R-1-P Districts, no building or land, except as otherwise provided in this Ordinance, shall be erected or used except for one or more of the following specified uses:

(a) all uses permitted in R-1 Districts

(b) * * * public utility buildings * * * transformer stations without Service or storage yards, subject to the approval of the Planning Commission as being not injurious to surrounding neighborhood and not contrary to the spirit and purpose of this Ordinance.

* * * * * *

Article VII

R-2 TWO FAMILY RESIDENTIAL DISTRICTS

Section 7.01 *Uses Permitted.* In all R-2 Districts, no building or land, except as otherwise provided in this Ordinance, shall be erected or used except for one or more of the following uses:

(a) all uses permitted in R-1 Districts.

* * * * * *

(c) two family dwellings.

* * * * * *

Article VIII

R-3 MULTIPLE FAMILY RESIDENTIAL DISTRICTS

Section 8.01 *Uses Permitted.* In all R-3 Districts no building or land, except as otherwise provided in this Ordinance shall be erected or used except for one or more of the following uses:

(a) all uses permitted in R-2 Districts

(b) apartment houses, apartment hotels, and efficiency apartments.

* * * * * *

Article IX

PB—PROFESSIONAL BUSINESS DISTRICTS

Section 9.01 *Uses Regulations.* In all PB Districts, no building or land, except as otherwise provided in this Ordinance shall be hereafter erected or altered except for one or more of the following uses:

(a) all uses permitted in R-2 Districts.

(b) Professional offices of a doctor, lawyer, dentist, architect, engineer, or any other profession which sells professional services.

* * * * *

Article X

C—COMMERCIAL BUSINESS DISTRICTS

Section 10.01 *Uses Permitted.* In all C Districts, no buildings or land, except as otherwise provided in this Ordinance, shall be erected or used except for one or more of the following specified uses:

* * * * *

(k) PUBLIC SERVICES, including bus stations, public utility buildings, and transformer stations or sub-stations without storage yards.

Article XI

M-1 LIGHT INDUSTRIAL DISTRICTS

Section 11.01 *Uses Permitted.* In all M-1 Districts, no buildings or land, except as otherwise provided in this Ordinance, shall be erected or used except for one or more of the following specified uses:

(a) All uses permitted in C Districts.

(b) * * *

(3) Public Utility service yards or electric receiving or transforming stations.

Article XIII

CITY PLANNING COMMISSION APPROVAL

* * * * *

Section 13.02 The Planning Commission of the City of East Detroit may enter into agreements with applicants for permits which shall be binding * * * The City Planning Commission shall refuse to issue a permit to any person, firm * * * who has refused or neglected to enter * * * any agreement involving the details of this paragraph when in the opinion of the Planning Commission, such agreement is necessary.

Section 13.04. The Planning Commission shall investigate the circumstances of each case and shall notify such parties, who may in its opinion be affected thereby * * * of any public hearing * * * required by this Ordinance, and shall be satisfied that the property adjacent to the area included in the petition, will not be adversely affected, and shall conform to the limitations and restrictions specified for each of the following listed exceptions:

* * * * * *

(c) PUBLIC UTILITY BUILDING ERECTION OR ENLARGEMENT. Permit the erection and use of a building, or an addition to an existing building of a public service corporation to be used for public utility purposes, in any permitted district to a greater height or of a larger area than the district requirements herein established, and permit the location in any use district of a public utility building structure, or use, providing the Planning Commission shall find such use, height, area, building or structure reasonably necessary for the public convenience and service, and provided, further, that such building, structure, or use is designed, erected and landscaped to conform harmoniously with the general architecture and plan of such district.

Article XV

ADMINISTRATION

Section 15.02. It shall be unlawful to build or use or permit the building or the use of any structure or land or part thereof hereafter created, erected, or altered, or to change or enlarge the use of any building or land or part thereof until a zoning permit, in accordance with the provisions of this Ordinance, properly endorsed as to occupancy in a manner herein provided, shall have been issued by the Building Inspector, hereinafter authorized.

Section 15.03 *Application for Permits.* An application for a permit shall be made to the Building Inspector. Such application shall be accompanied by a plat in duplicate, drawn to scale, showing the exact dimensions of the land and structure to which the permit is to apply * * *.

Article XVI

VIOLATIONS AND PENALTIES

Section 16.01. It shall be the duty of all * * * persons having charge of establishment of any use of land, or the erection * * * of any building or structure, * * * before beginning * * * such work to see that a proper permit has been granted therefore, and that such work does not conflict with and is not in violation of the terms of this Ordinance.

APPENDIX B

JUDGMENT AND OPINION OF THE UNITED STATES DISTRICT COURT

(See page 2 of Petition, *supra.*)

APPENDIX C

JUDGMENT AND OPINION OF COURT OF APPEALS

City of East Detroit, a Municipal Corporation, et al. Appellants,

v.

Detroit Edison Company, a New York Corporation, Appellee

No. 19315.

United States Court of Appeals Sixth Circuit.

Dec. 14, 1959.

Action wherein the United States District Court for the Eastern District of Michigan, Southern Division, Arthur F. Lederle, J., rendered judgment ordering issuance of permit to construct control shelter for electric transformer station and an appeal was taken. The Court of Appeals, Per Curiam, held that, under Michigan law, Board could not rehear matter after expiration of five days, and that resolution of March 3, 1958, granting permit having become final, it was duty of Board to approve plan submitted in conformity therewith, and its rejection of plan, on May 12, 1958, and its refusal to issue building permit, were arbitrary and unreasonable.

Affirmed.

Under Michigan law, Board could not rehear matter after expiration of five days, and resolution of March 3, 1958, granting permission to construct control shelter for electric transformer station, having become final, it was duty of Board to approve plan submitted in conformity therewith, and its rejection of plan, on May 12, 1958, and its refusal to issue building permit, were arbitrary and unreasonable. Comp. Laws Mich. 1948, §125.585.

Carl B. Weymouth, East Detroit, Mich. (David Gooze, Detroit, Mich., on the brief), for appellants.

Laurence M. Sprague, Detroit, Mich. (Harvey A. Fischer, George Hogg, Jr., Detroit, Mich. on the brief), for appellee.

Before Martin, Miller and Weick, Circuit Judges.

Per Curiam

The Board of Appeals on Zoning of the City of East Detroit, on March 3, 1958, granted to the appellee permission to construct on its property in said city, a control shelter for its electric transformer station. The architectural plans therefor were to be submitted to the City Planning Consultant and the City Council for approval.

On May 9, 1958, the City Planning Consultant approved the plans submitted by appellee as conforming with the general architecture and plan of the district subject to some minor changes to which appellee agreed.

On May 12, 1958, the Board undertook to rehear the matter and passed a resolution rejecting the plans. An election had intervened resulting in some change in the composition of the Board.

Under the plain language of the zoning ordinance appellee had the right to construct, erect and

maintain its electrical transmission system without any permit as this was expressly excepted from the operation of the ordinance. The Company needed only the permit to construct the control shelter for its electric transformer station. This was an integral part of its system without which it could not be operated or maintained.

Having granted permission to construct the control shelter on March 3, 1958, the Board could not rehear the matter under Michigan law, after the expiration of five days. McVeigh v. City of Battle Creek, 1957, 350 Mich. 214, 86 N. W. 2d 279; M. S. A. §6.2835, Comp. Laws 1948 §125.385. The resolution of March 3, 1958, therefore had become final and it was the duty of the Board to approve the plans submitted in conformity therewith. Its rejection of the plans and refusal to issue the building permit was arbitrary and unreasonable.

The District Court was right in granting judgment on its findings of fact and conclusions of law in favor of appellee ordering the City to issue the permit and its judgment is, therefore, affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 787

CITY OF EAST DETROIT, a Municipal Corporation, Aloysius L. Kapelczak, James E. Anderson, George S. Stone, Sr., Edward J. Bonior and Donald G. Tarnowski, as the Mayor and Common Council of said City and the Board of Appeals on Zoning of said City, and Charles H. Beaubien, as City Clerk and City Manager,
Petitioners and Defendants,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,
Respondent and Plaintiff

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

For a complete understanding of the situation which gave rise to this litigation, Petitioners' Statement of the Case is inadequate and should be supplemented by the following:

On page 2 of the Petition, Counsel for Petitioners refers to a joint appendix filed in the Court of Appeals. This is an error. Petitioners and Respondent each filed a separate appendix.

The facts in this case are clear and undisputed. Substantially all of the facts are admitted by the pleadings (Complaint, 3a-15a,* and Answer, 15a-18a) and by the Stipulation of Facts (33a-42a).

The Respondent, The Detroit Edison Company, operates an integrated electrical system supplying electric energy to southeastern Michigan, (13 counties) including the City of Detroit and the Thumb area so called.

Because of the steadily increasing demand for electric energy in the Petitioner, City of East Detroit, and surrounding area, it is necessary that Respondent, build and maintain an electric transformer station in the area for the purpose of providing the type of electric service incumbent upon Respondent as a public utility to provide (Stipulation of Facts, 35a).

After investigation of all the sites within the area of the electrical load center for the transformer station site, the Collinson Avenue-Kelly Road location in the City of East Detroit was decided upon as the only available site.

The location of such a station is determined as a matter of engineering judgment. It should be located near the center of the growing electric load. After extensive surveys, it was determined that the site selected was the only one available near the proper location which would meet engineering requirements (66b-67b).

The parcel of property selected is located in an area zoned under the East Detroit Zoning Ordinance as R-1, One Family Residential Districts (Stipulation of Facts, 41a). The property constituting the proposed transformer

*Figures in parentheses followed by "a" are references to Petitioner's Appendix and those followed by "b" are references to Respondent's Appendix, each filed in the Court of Appeals and a part of the certified transcript of record in this Court.

station site is not subject to any building and use restrictions imposed by anyone in the chain of title (Stipulation of Facts, 35a-36a). It is in an area which in 1957 and today is only partially and haphazardly developed and much of the surrounding area is vacant land. The buildings vary markedly in value and architecture (21a; 29a; 12b-14b). There is no uniform plan of development or uniform architecture within the area (18b). The photographic exhibits (45b through 56b, inclusive) conclusively support the District Court's findings in this regard (21a; 29a).

The station will consist of (a) wires leading into the station, (b) transformers for stepping down the voltage, (c) wires leading out of the station, and (d) automatic controls. The station is not a building and no city permit is required for the construction. The "control shelter" which is a part of the station is a small building which when completed will house the delicate automatic controls governing the operation at the station. It will not be a place of residence.

On December 17, 1957, Respondent filed a request with the Planning Commission of Petitioner City for a permit, under Section 13.04(c) of the Zoning Ordinance of Petitioner City, to erect a control shelter or container on such site as part of the transformer station (Stipulation of Facts, 36a).

Respondent's representatives appeared before the Planning Commission at public hearings on January 2, 1958 and February 6, 1958 and with maps and drawings explained completely the nature of the project, the function of the control shelter as an essential part of the transformer station, and the absolute necessity of locating the transformer station in the area. Numerous objectors appeared at these meetings whose questions were answered.

On February 6, 1958, the Planning Commission was unable to agree on granting Respondent's request and referred the request to the Board of Appeals on Zoning (Par. 8 of Complaint, 6a, admitted by Par. 8 of Answer, 16a).

The Petitioner, Board of Appeals on Zoning, held public hearings on Respondent's request on February 18, 1958, March 1, 1958, and March 3, 1958. Respondent's representatives again made a complete and factual showing as to the necessity for locating and building the transformer station, the character of the station, the function of the control shelter, and the public necessity for the station being built in the approximate location of the site. Numerous objectors appeared and presented their objections (Par. 10 of Complaint; 8a, admitted by Par. 10 of Answer, 17a).

On March 3, 1958, the Petitioner Board of Appeals on Zoning unanimously approved the request of the Respondent for construction of the control house "• • • subject to the proposed brick wall construction on Collinson Avenue having a proper set-back, the ingress and egress to the project being from Kelly Road, and the Architecture Plans to be approved by the City Planning Consultant and then submitted to the City Council for final approval" (Par. 10 of Complaint, 8a, admitted by Par. 10 of Answer, 17a).

Respondent then made changes in its plans to comply with the suggestions of the Board of Appeals and submitted them to Waring & Johnson, the planning consultants to the City of East Detroit, who wrote an opinion reading in part as follows:

> "• • • We have given this subject matter careful consideration and have made numerous suggestions for changes and additions to the original plans. We have attempted to be reasonable and fair in mak-

ing these suggested changes, all of which Detroit Edison Company was acquiesced.

* * * * *

We therefore approve these plans as complying with the conditions imposed by a motion of the City Council of East Detroit at their regular meeting held on Monday, March 3, 1958.

We recommend approval of these plans, site plan #5XA842-4 dated 4/4/58, and perspective elevation drawing #5XA842-6 dated 5/7/58, as complying as far as is reasonably possible to the requirement of the Zoning Ordinance and to City Council Motion of March 3, 1958." (See Exhibit 16, Respondent's Appendix, p. 41b.)

Prior to this action of the Board approving Respondent's request the Board had conducted public hearings on two occasions (57b-64b; 65b-92b; 93b-101b); the Board had heard detailed objections from those opposed to Respondent's request (69b-74b; 97b-98b); and had opened the hearing to the public generally, regardless of immediate interest (59b-64b; 96b). The Board had been advised by attorneys (60b-61b; 81b; 80b; 99b; 103b) and had met in executive session (63b). Numerous suggestions and conditions, subsequently complied with, were made by the Board to Respondent (102b). The Board had all the facts before it on March 3, 1958.

During the campaign for a municipal election to elect two councilmen, held in Petitioner City on April 7, 1958, a member of the Southeastern Property Owners Association distributed a scurrilous and libelous circular attacking Appellee, and the Councilmen of Petitioner City for having granted Respondent the permit for the erection of the control shelter (Exhibit 10 (Exhibit 1, Bill of Complaint) 2b; 19b; 9a; 17a; 37a). As a result of this election

of April 7, 1958, two new Council members, Petitioners Bonior and Tarnowski, were elected to the Council, and, by virtue thereof, to membership on the Board of Appeals on Zoning (9a; 22a; 7b).

At a meeting of the newly constituted Board of Appeals on Zoning on April 28, 1958, letters were read from several property owners associations protesting the Council's action, as the Board of Appeals, approving the Respondent's request to build a control shelter as part of its transformer station. These associations requested immediate action to rescind the previous decision (108b). The Southeastern Property Owner's Association then requested a rehearing on the Board's action. After discussion and negotiation, the Board agreed to and did grant a "rehearing" on May 12, 1958 in exchange for a public apology and a public retraction of the libelous circular printed and distributed in the community (Stipulation of Facts, 36a-38a; 35b; 106b; 108b; 109b).

On May 12, 1958, Respondent's representatives appeared before the Board, at request of the Board, and submitted the final plans which had theretofore been approved by the Planning Consultant as required by the Board's March 3, 1958 resolution. Respondent expressly refused to submit itself to a "rehearing," claiming lack of authority of the Board to conduct a "rehearing." The Board thereupon unanimously adopted a motion denying and rejecting Respondent's plans because the "* * * Plan does not conform harmoniously with the general architecture and plan of such district * * *". Shortly thereafter the Southeastern Property Owners' Association circulated a public announcement entitled "Victory" (Par. 14 of Complaint, 10a-11a, admitted by Par. 14 of Answer, 17a; 3b).

On March 27, 1958 certain property owners, filed suit in the Circuit Court for Macomb County, State of Michi-

gan, to enjoin Petitioner City from issuing to Respondent the requested permit. Respondent filed a petition to intervene as party defendant in that suit but, while the petition was pending, the East Detroit City Council passed its resolution of May 12, 1958 rendering the issues in the case moot (Stipulation of Facts, 42a). Some of those property owners filed a petition to intervene as party defendants in the District Court and their counsel took part in the proceedings in that Court. Following judgment for Respondent, the District Court dismissed the Petition for Intervention (1a). The intervenors did not appeal the judgment of the District Court.

The District Court made findings of fact and conclusions of law and on November 10, 1958 entered judgment for the Respondent.

This judgment was affirmed by the Court of Appeals on December 14, 1959.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioners plant their right to review by writ of certiorari on the claim that the Court of Appeals decided an important question of state law in a way in conflict with applicable state law. They fail to state what state law they rely upon or how the decisions of the Federal Courts are in conflict with state law.

There were only two legal issues presented to the Court of Appeals:

(1) Was the transformer station excepted as an "essential service" from the provisions of the East Detroit Zoning Ordinance?

This involved a construction of the city's ordinance. No state statute was in any way involved.

The answer to this issue is obvious. It involves only the application of the plain and unambiguous language of the Ordinance to stipulated facts. No court could come to a different conclusion than did the District Court and the Court of Appeals.

(2) Did the East Detroit Council sitting as a Board of Appeals on Zoning have power to grant a rehearing after the expiration of five days on the Company's petition for a permit?

This involved a construction of the State Zoning Act.

As to this second issue, whether the Zoning Board of Appeals had power to grant a "rehearing," the Court of Appeals followed the latest Michigan case construing the applicable provisions of the State Zoning Act *McVeigh v. City of Battle Creek* (1957) 350 Mich. 214; 1 Mich. C. L. '48 §125.585; (4A M. S. A. §5.2935,) Counsel for Petitioners admits this was correct on page 7 of the Petition.

This leaves only one issue, the meaning of the "essential services" provisions of the East Detroit Zoning Ordinance, which the federal courts are alleged to have construed in a way which is in conflict with state law. Petitioners have not specified what the conflict is. As a matter of fact there is no conflict.

On pages 10 and 11 of the Petition, counsel states that other matters of state law are "involved". We do not know what counsel means by "involved" but certainly none of the three matters mentioned was in issue, nor discussed, nor decided by either of the Federal Courts.

Each of these items (itemized as A, B and C on pages 10 and 11 of the Petition) is completely frivolous and with-

but merit. None of them was raised or considered in either of the courts below.

A. Counsel asserts that the "essential services" provision of the East Detroit Ordinance destroys the "uniformity requirement" of the zoning enabling statute (1 Mich.; C. L. '48 §125,583; 4A-MSA §5.2933).

The short and simple answer is that the blanket "essential service" exemption of the ordinance applies uniformly to all zoning districts, not merely to those of the same classification.

This argument is patently frivolous and was not urged in the courts below.

B. It is next asserted that unprecedented local administrative procedures were approved because,

(1) Only the City Planning Commission could grant the permit for the control house requested by Respondent, and did not do so by virtue of its tie vote and referral to the Board of Appeals on Zoning.

(2) The Board of Appeals on Zoning granted the requested permit on March 3, 1958 but Petitioners claim it had no authority to do so.

Petitioners themselves answer point (1) by their argument on page 11 that the authority purportedly vested in the Planning Commission to grant the permit is illegal and void. Under the Zoning enabling statute, Planning Commissions, Petitioners claim, are limited to advising and recommending. Respondent sees no need for extended discussion of an issue which Petitioners raise and then refute in their own argument. There can, therefore, be no objection to Respondent's failure to secure a permit from a body which Petitioners insist has no legal authority to grant permits.

As to point (2), short references to the zoning enabling statute and the East Detroit Zoning Ordinance show the existence of complete authority for the Board of Appeals on Zoning to grant the requested permit on March 3, 1958.

1 Mich. C. L. '48 §125.585 (4A-MSA §5.2935), the section of the City Zoning Act which authorizes the creation and provides for the duties of a Board of Appeals, provides in pertinent parts as follows:

> (a) "* * * Such board of Appeals shall hear and decide appeals from and review any order, requirements, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to the provisions of this act. *They shall also hear and decide all matters referred to them* or upon which they are required to pass under any ordinance of the legislative body adopted pursuant to this act. Such appeal may be taken by any person aggrieved or by any officer, department, board or bureau of the city or village * * *." (Emphasis supplied.) (Petition page 16.)

Article XIV of the East Detroit Zoning Ordinance adopted pursuant to the above enabling statute provides for the duties of the Board of Appeals on Zoning as follows:

> * * * * *
>
> 14.05 Jurisdiction and Appeals
>
> (a) The Board shall hear and decide appeals from and review any order, requirements, decision or determination made by an administrative official charged with the enforcement of this Ordinance. *They shall also hear and decide all matters referred to them* or upon which they are required to pass upon this Ordinance (28b). (Emphasis supplied.)

Under both the enabling act and the Ordinance, the Board of Appeals on Zoning had authority to decide mat-

ters referred to them. That is what the Board did in this case.

In summary, two conclusions are evident from Petitioner's contention B. The first is that any claimed "unprecedented local administrative procedure" was followed solely because the Respondent was required to follow the procedure established and required by Petitioners. The necessity of exhausting all administrative procedures and remedies is an explicit reason for Respondent's compliance with whatever procedure was set down by Petitioners. The second is that Petitioner obtained a permit from the only body (Board of Appeals on Zoning) which had authority under the enabling statute to grant such a permit. The power of Appeal Boards to grant variances and special exemptions is well known under practically all Zoning Statutes. The failure to secure a permit from a body (Planning Commission) that Petitioners contend had no authority to grant one surely cannot be objected to.

C. Petitioners' argument concerning procedure for amending the Zoning Ordinance has no merit at all. This case involved no amendment to the existing ordinance. It is concerned solely with clear rights under the then existing ordinance. Any discussion about ordinance amendment serves only to obfuscate the simple facts of this case.

The only issue is whether the construction of "essential services" provisions is contrary to state law.

ARGUMENT

The issues presented to and decided by the courts below in no way justify the issuance of a writ of certiorari by this Court.

At the outset we wish to emphasize that the issue which Petitioners are now seeking to inject into the case was not

raised by the pleadings nor in the District Court or the Court of Appeals. Counsel for Petitioners admit this on page 9 of the Petition.

This court does not consider questions not presented to the courts below:

> *Helvering v. Minnesota Tea Co.* (1935) 296 U. S. 378, 80 L. Ed. 284;
>
> *McCullough v. Kammerer Corp.* (1945) 323 U. S. 327, 89 L. Ed. 273;
>
> *McGrath v. Mftrs. Trust Co.* (1949) 338 U. S. 241, 94 L. Ed. 31.

Furthermore, the issue tendered by Petitioner has no substance.

The issue urged by Petitioner involves the construction of the definition of "Essential Services" appearing as Sec. 2.20 and of Sec. 4.14 of the East Detroit Zoning Ordinance, reading in part as follows:

> "2.20 * * * The phrase 'essential services' means the erection, construction, alteration or maintenance by public utilities * * * of * * * electrical * * * transmission or distribution systems, including poles * * * (but not including buildings) reasonably necessary for the furnishing of adequate service by such public utilities * * * for the public health, safety or general welfare" (48a).
>
> "4.14 * * * Essential services shall be permitted as authorized and regulated by law and other ordinances, it being the intention hereof to except such essential services from the application of this Ordinance" (49a).

Counsel for both parties made a stipulation of facts in the District Court. Paragraph 10 reads as follows:

> "The control shelter protects the delicate electrical controls which provide for the automatic operation of this electrical transformer station. *These controls along with the station of which they are a part, are an integral and necessary part of the electrical transmission and distribution system of The Detroit Edison Company.*" (36a) (Emphasis supplied.)

This stipulation removes any problem as to whether a transformer station is an "essential service". The parties through their attorneys have agreed that a transformer station is "an integral and necessary part of the electrical transmission and distribution system of The Detroit Edison Company".

The District Court and the Court of Appeals both held that under the literal meaning of the Ordinance the station was an "essential service" and exempt from the Ordinance. How could any State Court hold otherwise?

The Court of Appeals said:

> "Under *the plain language of the zoning ordinance* appellee had the right to construct, erect and maintain its electrical transmission system without any permit *as this was expressly excepted* from the operation of the ordinance. The Company needed only the permit to construct the control shelter for its electric transformer station. This was an integral part of its system without which it could not be operated or maintained." (Emphasis supplied.) (Appendix to Petitioners' Petition pages 26 and 27.)

Petitioners fail to show how any state court could possibly come to any other conclusion. The State Zoning Act is not in any way involved in this phase of the controversy. What is involved is the application of the plain and un-

ambiguous language of the City Ordinance. This claim has no merit.

This is a diversity case. Respondent started this case in Federal Court to escape the effect of the political propaganda which was building up in East Detroit, Macomb County.

In such a case the Federal Courts have performed their duty in deciding (in accordance with state law) the two simple issues that were necessary for decision. In interpreting the "essential services" provision of the ordinance the District Judge and the Court of Appeals acted as would the Michigan Courts. The interpretation cannot be said to be a difficult one nor one involving a fine and intricate analysis of state law.

The duty of the Federal Courts to act in diversity cases, even where the issues are complex under state law, is set forth in *Meredith v. City of Winter Haven* (1943) 320 U. S. 228, 88 L. Ed. 9 where Mr. Justice Stone speaking for the court stated at pages 234 (or 13), and page 237 or 15):

> "* * * The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. * * * When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions

of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." • • •

"• • • *Erie R. Co. v. Tompkins*, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, *supra*, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining any applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain." • • •

It is to be noted that in the present case we have no federal or constitutional question, and it seems important to note that Petitioners do not themselves assert any constitutional question under the provision of Supreme Court Rule 19, 1 (b) as a basis for their petition for review on certiorari.

Application of the abstention doctrine in this case, where there is no serious federal or state constitutional question, nor a conflicting federal-state policy, would by reason of the extensive time involved in reinstituting suit in the state court cause unreasonable delay and impair the respondent's ability to provide adequate electric service to the public.

In *Meredith v. City of Winter Haven, supra*, Mr. Chief Justice Stone, in language fittingly applicable to this case, stated:

> "• • • We are pointed to no public policy or interest which would be served by withholding • • • the benefit of the jurisdiction which Congress has created with the purpose that it would be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. *To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.*" (pp. 237 or 9.) (Emphasis added.)

One can only conclude that the doctrine of abstention, urged in this court for the first time and at this late date, is raised solely to foster Petitioner's strategy of delay and to focus attention away from the lack of meritorious substantive issues of the case, which issues were resolved with comparative ease by both the District Court and the Court of Appeals.

On page 9 of the Petition, reference is made to a state court action which became "moot" (See Stipulation of Facts 42a). This reference was to a case pending in the State Court, the Circuit Court for the County of Macomb, yet the city and the intervenors abandoned this state case and submitted to the jurisdiction of the Federal Courts in this case. Should the city be permitted at this late date to reverse its field and say that the case should be decided in a State Court?

"Essential service" provisions or something similar are necessary in Zoning Ordinance to enable a public utility properly to serve the public. The location and construction of "a transmission and distribution system" is governed by engineering principles in view of the consumer demand.

They cannot be placed just anywhere. These provisions of the ordinance were enacted in recognition of this situation.

This case does not involve an important issue of general law. The issues raised in this case are not of special or general importance. As was pointed out above, the opposition to the construction of this substation is purely political. A small group of property owners in East Detroit have dedicated themselves to the program of excluding from the City any substantial commercial or industrial use.

For ten years such groups have succeeded through political intimidation of the City Council in preventing such uses of property within the city (See statement of Councilman Stone p. 101b). As a result the City has an inadequate tax base and the community has been injured.

In balancing the interests involved, we have first an electric utility serving an important area of the State of Michigan which finds it imperative to locate and build a transformer station. After waiting two years for litigation in two federal courts, it cannot wait longer to build this station without danger to the quality of its service to the public.

On the other hand we have a small group of property owners trying to prevent the station. None of these live in close proximity to the station. Actuated largely by emotional actors, they are trying by agitation and political pressure on the council to keep the station outside the City of East Detroit without regard to the merits of the situation. The interest of these people cannot outweigh the right of the general public in this area to adequate electric service.

CONCLUSION

This case presents none of the features which are usually thought necessary to justify the issuance of a writ of certiorari by this court. Petitioners have failed to define the errors committed by the Court of Appeals or to state the ultimate relief they seek if the writ is granted. No constitutional issue, federal or state, is even claimed to be present. No question of federal law is involved. There is no important issue of general law present in this case. On the one point of state law, i. e. the meaning of the "essential services" provision in the Zoning Ordinance of East Detroit, the Petition fails to show how a state court could construe this language in any other way than did the District Court and the Court of Appeals in this case.

The paucity of reasons for the writ set forth in the Petition leads to the conclusion that it was filed solely for purposes of additional delay.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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March 28, 1960.